IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

THE MONTANA WILDERNESS ASSOCIATION, INC., No. 38544

Plaintiff,

vs. ORDER and OPINION

THE BOARD OF LAND COMMISSIONERS and THE DEPARTMENT OF STATE LANDS OF THE STATE OF MONTANA,

Defendants.

On January 16, 1975, defendants filed a motion to quash the temporary restraining order issued herein on four separate grounds, and arguments and testimony were heard the same day. Briefing by all parties and Friends of The Earth and Big Horn Canyon Highway Association as amici were filed by January 29, 1975. The law and the evidence as thus presented have been considered and thereupon the Court now makes its Order.

It is ORDERED, ADJUDGED and DECREED that the said motion is granted and the cause dismissed.

Defendants first ground is that the plaintiff does not have standing to sue. As to the first claim, I cannot agree.

The initial inquiry is whether the plaintiff has standing under any statute. There is no general Montana statute granting an organization such as the plaintiff standing to challenge the action of a state agency on environmental grounds. The Montana Environmental Policy Act (MEPA) (Ch. 238, L. 1971, Sections 69-6501, et. seq., R.C.M. 1947), upon which plaintiff bases its first claim, does not specifically provide for appeal to the district court by anyone.

The Montana Administrative Procedure Act (MAPA) (Ch. 2, Ex. L. 1971, Sections 82-4201, et. seq., R.C.M. 1947) provides for judicial review in a "contested case" (Section 82-3216, R.C.M. 1947). A

"contested case" is defined (Section 82-4202 (3)) as "...any proceeding before an agency in which a determination of any legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing." (Emphasis added.) The pertinent statute (Section 81-803, R.C.M. 1947) provides specifically for the granting of highway easements across state lands by the Board of Land Commissioners. No hearing is provided for. The only "party" to the proceeding recognized, other than the State and the party seeking the easement, is a land purchaser or contractor, or an assignee of the same, and he can give, or presumably deny, consent. Thus, I can find no specific legal requirement for a hearing before determination by the agency on a request for an easement. The proceeding cannot therefore be characterized as a "contested case" under MAPA and it follows, under Section 82-4216, supra, that the plaintiff does not have access to the district court under that act. In the absence of statutory standing, stated or implied, we look to the complaint for allegations that might establish a basis for standing. Those allegations might fairly be summarized as follows: Plaintiff is an organization dedicated to the promotion of wilderness areas and to advancing environmental causes generally. Many of its 750 members live in the general area of the Big Horn Canyon National Recreation Area (BCNRA), they use and enjoy it, have opposed the proposed road, and their use and enjoyment of the area will be adversely effected by the granting of the easement (amended complaint, para. I). They have been injured by the failure of the Department to follow MAPA (para. 20), the injury is or will be irreparable because the environment will be irreparably damaged (para. 22), and the injury effects not only the plaintiff but all other citizens (para. 24).

These allegations were supported by the testimony of Elizabeth Smith, a member of the plaintiff organization, and former vice-president and board member, at the evidentiary hearing held in this matter. She additionally gave her opinion that a high-standard

road, such as the one proposed, would result in the destruction of archealogical remains and the "fragile" land. She testified plaintiff's members had driven, hiked and camped in the area, had a continuing interest in doing so, and that the damage anticipated by the proposed road improvement would effect that interest adversely.

Thus, in brief, plaintiff pleads an environmental interest and irreparable damage to that interest by action or pending action by the State.

The quantum of environmental interest necessary to create standing in a case such as this is the threshold question. I have not been referred to, nor can I find, a Montana case on the point. Both sides urge Sierra Club v. Morton (405 U.S. 727, 31 L. Ed 2nd 636, 92 S. Ct. 1361) as authority, it being recognized as the landmark case on the subject of the standing of environmental groups to challenge government action. As it deals with standing in relation to the National Environmental Protection Act (NEPA) after which the Montana act is modeled, it would seem to be an appropriate guide. Although the case was decided, apparently, by four justices with two justices not participating and three dissenting, there does not appear to be any disagreement on the following statement by Justice Potter Stewart, writing for the Court:

> "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' Baker v Carr, 369 US 186,204,7 L Ed 2d 663,678,82 S Ct 691, as to insure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast v Cohen, 392 US 83,101, 20 L Ed 2d 947,962, 88 S Ct 1942."

If we accept this as a guideline, it would seem that the allegations and proof noted above would qualify the plaintiff as to standing. While the personal stake of the individual members concerned does not seem overwhelming, the alleged collective stake of the organization seems substantial enough to assure presentation in an

adversary context. A reading of the Flast case referred to at the page noted illuminates the meaning of the phrase "in a form historically viewed as capable of judicial resolution." This phrase seems to mean that historically the federal courts have been reluctant to entertain "ill defined controversies", cases of a "hypothetical or abstract character", "friendly suits" or those which are "feigned or collusive in nature." If the case does not suffer from these infirmities and a truly adversary situation exists the plaintiff is entitled to standing in the federal courts. The basic rule set out in these cases seems to have been expanded or refined in two cases prior to The Sierra Club case (Barlow v. Collins, 397 U.S. 159 and Data Processing Service v. Camp, 397 U.S. 150). In these cases it was held that standing could be established by alleging "injury in fact" to an interest "arguably within the zone of interests" to be protected or regulated by the statutes that the agencies are claimed to have violated. It would seem that a similar rule could be applied in environmental cases in Montana and in this case, particularly in view of our constitutional and statutory provisions having to do with the citizen and the environment. In a case concurrently under consideration in this court (#38092, Montana Wilderness Association and Gallatin Sportsmen's Association v. The Board of Health and Environmental Sciences and Beaver Creek South, Inc., Intervenor) we noted in our memorandum of February 11, 1975:

> "Our 1972 Constitution provides that the courts 'shall be open to <u>every</u> person, and speedy remedy afforded for <u>every</u> injury of person, property or character.' (II,16). The state is enjoined to 'maintain and improve a clean and healthful environment in Montana for present and future generations' (IX,1). Pursuant to this constitutional directive M.E.P.A. was enacted. M.E.P.A. makes it a state policy' * * * in co-operation with the federal government and local government, <u>and other concerned public and private organizations</u>, to use all practicable means and measures * * *to create and maintain conditions under which man and nature can co-exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.' (69-6503).

> The same section of M.E.P.A. provides: 'The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.' The final paragraph of the next section (69-6504) requires that proposed impact statements be made available to the public.
>
> I believe all this gives individuals and groups in this state a status in environmental affairs that they didn't have before the advent of the new Constitution and M.E.P.A. How is their new status to be secured and maintained if access to the courts is barred to them?
>
> The answer is offered that one goes to the Attorney General. But the Constitution and M.E.P.A. do not provide any change in status to the Attorney General in regard to environmental matters--they give it to individuals and to public and private groups. And no one has ever argued before, as far as I know, that the Attorney General has any kind of exclusive standing to seek injunctive relief against state agencies.
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> Adjudicating acts similar, if not identical, to M.E.P.A., the courts of other states, such as California and Washington, have had little hesitation in following the federal courts in providing access to groups such as the plaintiffs here under M.E.P.A. It is true that the federal courts had the federal administrative procedures act to aid in creating access. But it appears that the state courts, in following the federal courts, did not have or did not utilize, such a wedge. They simply found that their environmental acts, similar to ours, provided a new right for individuals and groups--the right to access to the courts to secure the policy aims in the environmental field stated by their legislatures."

For these reasons, I believe the plaintiff here should be accorded standing, even though there is no specific statutory provision which authorizes it. There is a justiciable interest, there is an adversary relationship that will assure full consideration of genuine issues, the matter could be resolved in acceptable and accepted procedural forms, and the injury alleged is arguably within the zone of interest to be protected under MEPA. Furthermore, the need for resolution of controversies such as this at the instance of the citizen or a citizen group is recognized in both our Constitution and statutes. (The Court will note its awareness that S.B. 203 of the 44th Legislature is, at the time of this writing, in enrolling after

passage through both Houses. Section 3 of the bill gives standing in district court to any person against any other person causing or about to cause damage to the environment. Remedies against administrative agencies are also provided. We would view this as implementing legislation, which we believe, as indicated, is not indispensable to standing in an appropriate case.)

The second basis offered for quashing the restraining order is that this court does not have jurisdiction.

Initially, we are faced with the restriction placed upon the court by Section 93-4203, 1947, which prohibits injunctions to prevent the execution of a public statute, by officers of the law, for the public benefit. This restriction may not apply where there is irreperable injury and a clear showing of illegality (State ex rel Keast v. Krieg, 145 M. 521, 528). As noted, irreperable injury to the particular group represented by plaintiff is at least pleaded here. But is there a clear showing of illegality alleged in the pleading or shown by the evidence so far received?

The first claim as to illegality made in the rather discoursive amended complaint is that the Department and the Board failed to follow the "guidelines" laid down by The Environmental Quality Council (EQC) (Defendants' Exhibit "D"), and the Department's own "guidelines" (Defendants' Exhibit"E") made pursuant to the EQC "guidelines". Various such violations are set forth under the first claim (embracing paragraphs 12 through 17 of the amended complaint), all of which , it is alleged, violate MEPA.

The first question raised by these allegations is whether The EQC's guidelines are binding on and enforceable against the agencies of the State government. The answer to this question will be determined by considering what kind of an animal The EQC is, and what kind of power it has. At the outset, it should be noted that it is clearly not the same kind of an agency that its federal counterpart is. Section 202 of NEPA (42 USC 4342) creates in the Office of the President a Council on

Environmental Quality (CEQ) composed of three members appointed by the president. The duties and functions of the CEQ (Section 204) relate entirely to the President and the executive branch of the government and are basically advisory. There is no functional relation or liaison between the CEQ and the Congress. Montana's EQC, on the other hand, seems to be more of an arm of the legislature, although this is not entirely clear, and has a study-advisory function which runs to both the governor and the legislature. (Section 69-6514, R.C.M. 1947). One other difference is that the CEQ itself is designated as the functional entity for all purposes in the federal legislation, while the only functions the statute prescribes for Montana's EQC is the holding of hearings (Section 69-61516, R.C.M. 1947): The appointment of an executive director (Section 69-6511) and the approval of his employees (Section 69-6512) its executive director and staff are designated to perform all other functions, presumably, but not expressly, as agent of the Council. The powers granted the director and staff of the EQC in Section 69-6514 are limited to the making of studies and recommendations. There is no apparent authority to require anybody to do anything. Their recommendations must therefore be implemented and enforced by either legislative enactment or executive order.

The situation presented by the evidence here is that the EQC has laid down its "revised guidelines" for environmental impact statements (Defendants' Exhibit "D"). The Department of State Lands has laid down its "revised guidelines" "pursuant to MEPA" with no apparent reference to the guidelines of the EQC (Defendants' Exhibit "E"). The Department has issued its "notice of pending decision", undated, dealing with the project in issue, without reference to either its own or the EQC's guidelines, and its "detailed statement", dated "December, 1974", purportedly pursuant to MEPA Section 69-6504 (b)(3) R.C.M. 1947 but without reference to its own or EQC's guidelines.

A search by the Court of the Montana Administrative Code has failed to reveal any duly adopted rules by either EQC or any Department

or agency having to do with MEPA environmental impact statements. In this the agencies of the state government have abysmally failed to comply with the clear requirement of Section 82-4203 (1), R.C.M. 1947, which states:

> "(1) In addition to other rule making requirements imposed by law, each agency shall: * * * (b) Adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency."

Section 82-4204 makes it quite clear that the word "adopt" as used in the above-quoted section means the full notice and hearing procedure required for entry into The Montana Administrative Code (MAC) in accordance with Section 82-4205, R.C.M. 1947. Part (3) of the same section (82-4204) provides: "No rule adopted after the effective date of this act (December 31, 1972, Sect. 26, Ex. L. 1971) shall be valid unless adopted in substantial compliance with subsections (1) and (2) of this section." Inasmuch as any rule to implement the requirements of Section 69-6504, R.C.M. 1947, should, under that statute, be uniformly applicable to all agencies of the government, it would seem appropriate, if not mandatory, that the attorney general, in consultation with the EQC, should promulgate and cause to be adopted a model rule for environmental impact statements pursuant to Section 82-4203 (3), R.C.M. 1947. There is no indication that he has done so.

The result is that such rules or procedures as have been promulgated by the EQC and the agencies of the government, including The Department of State Lands, in regard to environmental impact statements have no actionable validity or enforcibility and a kind of anarchy prevails in this field. In the instant case, the Court has no basis for enforcement except for the statute itself, which stands unimplemented by effective agency rules.

I would add in passing that MEPA is now more than four years old (Sect. 18, Ch. 238, L. 1971). In that time, neither the EQC nor the

executive or legislative branches of the state government have developed a workable system for effective enforcement of its provisions. This is a standing and open invitation to the courts to involve themselves in executive and legislative policy making by default. While that invitation is rejected by this Court in this case, history teaches that courts are not always tolerant of vacuums in the law and frequently are prone to fill them. If an example is needed, I would cite Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F 2d 1109, a landmark in the development of federal environmental law, in which the U.S. Circuit Court for the District of Columbia made up for the delinquency of federal agencies in the implementation of NEPA.

Looking, then, as we must, to the statute alone, we are confronted at the outset with the requirement that detailed statements be included on proposed projects which can be described as "major actions of state government significantly affecting the quality of human environment" (Sect. 69-6504 (b)(3) R.C.M. 1947). This presents two questions: Is this a major action of state government, and will it significantly affect the quality of human environment? In the absence of firm guidelines, either administrative or judicial, the answer to these two questions require the court to make two value judgments. It is my judgment that the proposed project as presented in the pleadings, briefs, testimony and exhibits, particularly the final environmental impact statement of the National Park Service (Defendants' Exhibits "A-1" and "A-2"), is neither a major project of the State of Montana nor of significant impact on the quality of human environment.

The tract for which the easement has been granted consists of 19.91 acres of what we eastern Montanans call "sagebrush land". The easement was granted to accomodate three-fourths of a mile of improved road with a 200 foot right-of-way to replace an existing graded road which is regularly traversed. It is also crossed by a power line.

There is no known surface evidence of archaeologic or historic sites on the state land through which the road passes or on the right-of-way granted. It would take more than twice the acreage involved to support a cow and a calf for a grazing season. The State is to receive $6,000 for the easement. It is difficult for me to conceive of the granting of this easement, standing alone, as a "major" state project.

The question then arises as to whether the project should be considered by itself, or should it be considered in the larger context of an integral part of the whole development of The Big Horn Canyon National Recreation Area. I think it is perfectly obvious from a review of the master plan for the area and at the final impact statement that this great national project is not going to rise or fall on the availability of the state easement. The only thing the State of Montana could accomplish by denying the easement, other than sacrificing $6,000 for the school fund, would be harrassment of The National Park Service. I would hesitate to characterize this function as a major state project. The State has better and more important things to do. Which is not to say that there may not be instances where combined state-federal projects, such as highways, would involve such a substantial state contribution and impact that they could, and should, be characterized as a major state project. In my opinion this project, simply as a matter of fact, as well as law, is not such a project. Nor do I believe the granting or denying of the easement will necessarily, or even probably, have <u>any</u> impact on the quality of human environment. In the first place, as previously suggested, I seriously question whether the State's final action will have any substantial effect on whether the road is constructed. Certainly it will not be critical as to whether the project as a whole is carried out. If the easement is denied, the road will be built on the adjoining section with equal or greater environmental impact. In view of this, and in view of the massive study of environmental impact that has been made and will be made by The National Park Service, I see no practical reason for

requiring the State to study the matter.

Thus I conclude that on the basis of the statute itself, the EQC and departmental rules being ineffective, The Department of State Lands was not required to compile and submit for review either a draft or final detailed or environmental impact statement in connection with this project. The fact that it did issue and circulate a "notice of pending decision" and a "detailed statement of environmental impact" can not be construed as binding The Department to compliance with Section 69-6504 (b)(3) in all respects on some kind of an equitable estoppel theory. The federal courts have found part (3) of the subsection to be discrete from parts (1) and (2). If this be so, one could view the Department's action as being in conformity with part (1), which calls on all agencies to:

> "Utilize a systematic, inter-disciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment."

Having thus concluded that the defendants have not acted illegally, I must find that the Court may not enjoin, temporarily or permanently, the carrying out of the defendant Board's grant of easement under plaintiff's first claim.

The second claim, made in paragraphs 17, 18 and 19 of the amended complaint, is that the defendants in granting the easement ignored or violated the provisions of Section 81-803, R.C.M. 1947, having to do generally with the granting by the defendant Board of easements across state lands, and Section 2 (a) of P.L. 89-664, 80 Stat. 913 of October 15, 1966, having to do with acquisition by the federal government of Montana state property for use in The Bighorn Canyon National Recreation Area.

In making this challenge, the plaintiff cannot invoke its peculiar interest as an environmental group to attain standing because the claim does not sound in an environmental concern but in a concern that

an ordinary citizen and taxpayer might have for failure of a government agency to act according to law. Our Supreme Court has consistently followed the general rule that "private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." (Holtz v. Babcock 143 M.341; Chovanak v. Mathews, 120 M. 520; State ex rel. Mitchell v. District Court, 128 M. 325; State ex rel. Keast v. Krieg, 145 M. 521) The violation alleged in the second claim (improper granting of an easement) would, if proven, have the same effect on all citizens and taxpayers, not just environmentally concerned citizens. For this reason, I find that the plaintiff lacks standing to maintain that claim.

The third claim stated in paragraphs 20 and 21 is that the defendants violated the Montana Administrative Procedure Act (MAPA, Sect. 82-4201, et seq., R.C.M. 1947) in that, this being a "contested case" within the meaning of that act (Sect. 82-4202 (3)) the plaintiff and others were entitled to a hearing, which was not provided. As noted in the discussion of standing as to the first claim, I do not believe this is a "contested case" within the meaning of the statute referred to, which disposes of this third claim.

Dated this 17 day of April, 1975.

GORDON R. BENNETT
District Judge